

a

INTER MARITIME MANAGEMENT SDN. BHD.

v.

KAI TAI TIMBER COMPANY LTD. HONG KONG

b

COURT OF APPEAL, KUALA LUMPUR
TUAN GOPAL SRI RAM JCA
DATO' SITI NORMA BTE YAAKOB JCA
DATO' MAHADEV SHANKER JCA
[CIVIL APPEAL NO. W-02-36 OF 1994]
21 JANUARY 1995

c

PRACTICE & PROCEDURE: Writ in personam claiming damages for negligent loss of property - Stay of proceedings - Foreign jurisdiction clause in the bill of lading - Whether parties bound - Principles on which stay may be granted - Direction of Judge - Whether clause to be termed "exclusive jurisdiction clause" or "forum-selection clause" - Difference compared to forum non conveniens.

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PRACTICE & PROCEDURE: Application for stay of proceedings - Whether made after taking a step in the proceedings - Objection to application for injunction - Whether amounts to a step in the proceedings.

On 16 August 1993 the vessel "The Interhill King" owned by the appellant sailed for Hong Kong with a cargo of about 4.8 million cubic metres of timber loaded at Kuala Mukah, Sarawak. The cargo belonged to the respondent. The vessel and its cargo was believed to have sunk en route in the South China Sea.

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The appellant is a company incorporated in Malaysia and the vessel was also registered here. The respondent issued a writ *in personam* against the appellant on 7 January 1994 claiming damages for the negligent loss of its property and also took out an *ex parte* injunction restraining the appellant from dissipating its assets not exceeding US 1 million.

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The injunction was later renewed without opposition from the appellant as the appellant felt that to do so would amount to taking a step in the proceedings and would prejudice the appellant's application for a stay of proceedings which was filed on 12 February 1994 relying on the exclusive jurisdiction clause in the bill of lading that was issued to the respondent for the cargo. The clause provided that the contract was governed by Japanese law and any action thereunder should be brought in the Tokyo District Court. The learned High Court Judge dismissed the application for stay on the grounds that the respondent was resident in Malaysia where the vessel was also registered, that cargo was loaded in East Malaysia and

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that it would be cheaper to transport the Filipino crew members here than to Japan. The respondent could also have difficulty enforcing a judgment obtained in Japan. The appellant appealed.

Held:

Per Gopal Sri Ram JCA (delivering the judgment of the Court):

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[1] Resisting the grant of an injunction would not amount to taking a step in the action as it is a defensive measure. The law has reached a stage where it may be quite safely said that there is no difference between cases where a stay is sought on an exclusive jurisdiction clause and cases where a stay is sought on an agreement to refer dispute to arbitration.

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[2] A jurisdiction clause is termed an exclusive jurisdiction clause or as a forum-selection clause. The latter term is preferred as it is more accurate a description.

[3] “The Eleftheria” test has not been questioned in any jurisdiction. It is the discretionary power of a Court to stay proceedings that is paramount. The relative merits of having a trial either in this country or in the agreed foreign tribunal as well as the competing considerations that have to be weighed in the balance when deciding whether to give effect to a forum selection clause or to ignore it are matters for the trial Judge. Evidence is usually by affidavit with hardly any question of credibility. Each case depends on its own facts and the Judge should be allowed to read in the quiet of his chambers, the evidence and the crisp and brief arguments. The appeal Court would be slow to interfere with his discretion.

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[4] The American approach cannot be followed as it puts to risk respected and high authority that recognise a wide discretion in a Judge hearing an application for a stay. It would also mean re-writing our law of contract.

[5] The law has not yet reached the stage where uniform principles are to be applied in applications based on the doctrine of *forum non conveniens* and those based on forum selection clauses. Under the doctrine of *forum non conveniens*, proceedings are properly commenced in this country. The defendant then applies to stay them on the ground that there exists elsewhere a forum that is more convenient to adjudicate the dispute. The burden is therefore on the defendant to demonstrate why the writ should not continue where it was commenced.

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For stay on forum-selection clauses, the plaintiff brings an action here in breach of an agreement to resolve the dispute in a foreign tribunal. The Court is not bound to give effect to such an agreement. Since consent cannot create or confer jurisdiction upon a Court that has none, it also cannot oust the proper jurisdiction. Once the defendant invokes the agreement, the burden is on the plaintiff to show why the agreement should not be honoured. Otherwise, the exercise of the discretion is almost identical in both cases.

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[6] On the facts, the learned Judge has committed no error in his statement of the law. He took into account all factors and came to the conclusion that trial here would be less expensive and more convenient. He was conscious of the burden on the respondent to produce strong grounds to displace the forum selected.

[Appeal dismissed].

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[Bahasa Malaysia Translation of Headnotes]

AMALAN & PROSEDUR: Writ in personam menuntut ganti rugi bagi kehilangan harta dengan cuainya - Penggantungan prosiding-prosiding - Fasal bidang kuasa asing dalam bil muatan - Samada pihak-pihak berkenaan terikat - Prinsip-prinsip di atas mana penggantungan prosiding boleh dikira - Arahan Hakim - Samada fasal boleh dinamakan “exclusive jurisdiction clause” (fasal bidang kuasa eksklusif) atau “forum-selection clause” (fasal pilihan forum) - Perbezaan jika dibandingkan dengan *forum non conveniens*.

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AMALAN & PROSEDUR: Permohonan untuk penggantungan prosiding-prosiding - Samada telah dibuat selepas mengambil satu langkah dalam prosiding-prosiding tersebut - Bantahan kepada permohonan untuk injunksi - Samada membawa kepada suatu langkah dalam prosiding-prosiding tersebut.

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Pada 16 Ogos 1993 kapal “The Interhill King” yang dimiliki oleh perayu telah belayar ke Hong Kong dengan muatan kargo kayu balak sebanyak 4.8 juta meter padu yang dipunggah di Kuala Mukad, Sarawak. Kargo tersebut kepunyaan responden. Kapal tersebut bersama-sama kargonya dipercayai telah tenggelam dalam perjalanan di Laut China Selatan.

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- a* Perayu adalah sebuah syarikat yang diperbadankan di Malaysia dan kapal tersebut adalah juga didaftarkan di sini. Responden telah mengeluarkan writ *in personam* terhadap perayu pada 7 Januari 1994 menuntut ganti rugi bagi kehilangan hartanya dan telah juga mengeluarkan satu injunksi *ex parte* menghalang perayu daripada memboroskan aset-asetnya yang tidak melebihi US1 juta. Injunksi tersebut telah kemudiannya diperbaharui tanpa bantahan daripada perayu kerana perayu berpendapat bahawa melakukan sedemikian akan membawa kepada satu langkah
- b* dalam prosiding-prosiding tersebut dan akan menjejaskan permohonan perayu untuk satu penggantungan prosiding-prosiding yang mana telah difailkan pada 12 Februari 1994 berdasarkan kepada fasal bidangkuasa eksklusif dalam bil muatan yang telah dikeluarkan kepada responden bagi kargo tersebut. Fasal tersebut memperuntukkan bahawa kontrak tersebut telah dikuasai oleh undang-undang Jepun dan mana-mana tindakan di bawahnya seharusnya dilakukan Tokyo District Court. Hakim Mahkamah Tinggi yang bijaksana telah
- c* menolak permohonan untuk penggantungan tersebut atas alasan bahawa responden adalah bermastautin di Malaysia di mana kapal tersebut telah juga didaftarkan bahawa, kargo telah dimuatkan di Malaysia Timur dan bahawa ianya lebih murah untuk membawa anak kapal berbangsa Filipino ke sini daripada ke Negeri Jepun. Responden juga mengalami kesukaran dalam menguatkuasakan penghakiman yang diperolehi di Negeri Jepun. Perayu telah merayu.

Diputuskan:

- d* **Per Gopal Sri Ram, HMR (menyampaikan penghakiman Mahkamah):**
- e* [1] Menolak pemberian satu injunksi tidak akan membawa kepada mengambil langkah dalam tindakan tersebut kerana ianya merupakan langkah pembelaan. Undang-undang telah sampai ke suatu tahap di mana ianya agak selamat untuk mengatakan bahawa tidak terdapat perbezaan di antara kes-kes di mana satu penggantungan dipohon atas satu fasal bidangkuasa eksklusif dan bagi kes-kes di mana penggantungan dipohon atas persetujuan untuk merujukkan pertikaian kepada timbangtara.
- [2] Satu fasal bidangkuasa di namakan fasal bidangkuasa eksklusif atau sebagai fasal pilihan-forum. Nama yang terkemudian adalah lebih disukai kerana ianya adalah suatu deskripsi yang lebih tepat.
- f* [3] Ujian “The Eleftheria” telah tidak dipersoalkan dalam mana-mana bidangkuasa. Ianya merupakan kuasa budibicara sesuatu Mahkamah untuk menggantungkan prosiding yang sangat penting: Merit relatif untuk menjalankan suatu perbicaraan samada di negeri ini atau pada tribunal asing yang dipersetujui dan juga pertimbangan persaingan yang harus juga ditimbang dengan seimbangnyanya bilamana memutuskan samada untuk memberikan penguatkuasaan kepada satu fasal pilihan forum atau untuk tidak menghiraukannya adalah
- g* perkara-perkara untuk Hakim perbicaraan pertimbangan. Keterangan adalah selalunya melalui affidavit dengan tiada apa-apa persoalan yang menyentuh perkara kebolehpercayaan. Setiap satu kes bergantung atas fakta-faktanya yang tersendiri dan Hakim seharusnya dibiarkan meneliti keterangan dan penghujahan yang ringkas dan tajam dalam kamarnya yang tersendiri. Mahkamah Rayuan akan mengambil masa yang lewat untuk mencampuri dalam budibicaranya.
- h* [4] Pendekatan menurut cara Amerika tidak boleh dituruti kerana ianya mengakibatkan risiko pada pihak berkuasa yang bertaraf tinggi dan dihormati yang mengiktirafkan budibicara yang luas dalam seseorang Hakim yang mendengar sesuatu permohonan untuk penggantungan. Ianya juga bermakna menulis semula undang-undang kontrak kita.
- [5] Undang-undang belum mencapai tahap di mana prinsip-prinsip yang seragam harus terpakai dalam permohonan-permohonan berdasarkan doktrin *forum non conveniens* dan yang
- i* berdasarkan fasal-fasal pilihan forum. Di bawah doktrin *forum non conveniens*, prosiding-prosiding dimulakan dengan wajarnya dalam negeri ini. Defendan kemudiannya memohon

untuk menggantungnya atas alasan bahawa wujudnya di tempat lain suatu forum yang lebih selesa untuk menghakimi pertikaian tersebut. Bebanan adalah dengan itu terletak pada defendan untuk menunjukkan mengapa writ tersebut seharusnya tidak diteruskan di mana ianya bermula. **a**

Bagi penggantungan fasal pilihan form, plaintif memulakan suatu tindakan di sini dalam memungkirkan suatu perjanjian untuk menyelesaikan pertikaian tersebut dalam tribunal asing. Mahkamah tidak terikat untuk memberikan penguatkuasaan kepada perjanjian yang sedemikian. Oleh kerana persetujuan tidak boleh mewujudkan atau menganugerahkan bidangkuasa ke atas sesebuah Mahkamah yang tidak mempunyainya, ianya juga dengan itu tidak boleh menolak bidangkuasa yang wajar. Sebaik sahaja defendan menggunakan perjanjian tersebut, beban akan terletak pada plaintif bagi menunjukkan mengapa perjanjian tersebut tidak seharusnya dipatuhi. Sebaliknya, perlaksanaan bidangkuasa tersebut adalah hampir-hampir serupa dalam kedua-dua kes. **b**
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[6] Berdasarkan fakta-fakta tersebut, Hakim yang bijaksana telah tidak melakukan apa-apa kesilapan dalam pernyataannya mengenai undang-undang. Beliau telah mengambil kira kesemua faktor-faktor dan membuat kesimpulan bahawa perbicaraan di sini adalah lebih murah dan lebih selesa. Beliau amat menyedari tentang beban ke atas responden untuk mengemukakan alasan-alasan yang kukuh bagi menolak forum yang dipilih. **d**

[Rayuan ditolak].

Cases referred to:

- Lister v. Stubbs* [1890] 45 Ch D 1 (*refd*)
- Zainal Abidin v. Century Hotel Sdn. Bhd.* [1982] 1 MLJ 260 (*refd*)
- Pacific Centre v. United Engineers (Malaysia) Berhad* [1984] 2 MLJ 243 (*refd*) **e**
- Seloga Jaya Sdn. Bhd. v. Pembinaan Keng Ting (Sabah) Sdn. Bhd.* [1994] 2 MLJ 97 (*fol*)
- Roussel-Uclaf v. G.D. Searle & Co. Ltd.* [1978] 1 Lloyd's Rep. 225 (*refd*)
- "The Vishva Apurva" [1992] 2 SLR 175 (*refd*)
- Bremen v. Zapata Offshore Company* [1972] 407 US 1 (*dist*)
- Globus Shipping & Trading Co. (Pte) Ltd. v. Taiping Textiles Berhad* [1976] 2 MLJ 154 (*fol*)
- The Fehmarn* [1958] 1 All ER 333 (*fol*)
- "The Eleftheria" [1970] P 94 (*fol*) **f**
- Sabah Gas Industries Sdn. Bhd. v. Trans Samudra Lines (S) Sdn. Bhd.* [1993] 3 CLJ 532 (*refd*)
- Aldred v. Australian Building Industries Pty Ltd.* [1987] 89 FLR 68 (*refd*)
- Green v. Australian Industrial Investment Ltd.* [1989] 90 ALR 500 (*refd*)
- Leigh-Mardon Pty. Ltd. v. PRC Inc.* [1993] 44 FCR 88 (*refd*)
- Williams v. Society of Lloyds* [1994] 1 VR 274 (*refd*)
- Apple Computer Inc. v. Apple Corps SA* [1990] 2 NZLR 598 (*refd*)
- G & E Auto Brokers v. Toyota Canada Inc.* [1981] 117 DLR (3d) 707 (*refd*) **g**
- American Express Bank Ltd. v. Mohamed Toufic Al-Ozeir*, (Supreme Court Civil Appeal No. 02-225-94) (*refd*)
- New Great Insurance Co. of India v. A.S.A. Kampagni* AIR [1964] Bom. 71 (*refd*)
- Ramji Dayawala & Sons (P.) Ltd. v. Invest Import* AIR [1981] SC 2085 (*refd*)
- Hindustan Zinc Ltd. v. Associated Metals & Minerals Corpn.* AIR [1983] Bom. 131 (*refd*)
- "The El Amria" [1981] 2 LILR 119 (*fol*) **h**
- Carvalho v. Hull, Blyth (Angola) Ltd.* [1979] 1 WLR 1228 (*refd*)
- Trendtex Trading Corpn. v. Credit Suisse* [1980] 3 All ER 721, [1982] AC 679 (*refd*)
- The Kislovodsk* [1980] 1 LILR 183 (*refd*)
- The Benarty* [1984] 2 LILR 244 (*refd*)
- "The Maldivian Importer" [1986] 1 MLJ 12 (*refd*)
- "The Asian Plutus" [1990] 2 MLJ 49 (*refd*)
- Amerco Timbers Pte. Ltd. v. Chatsworth Timber Corporation Pte. Ltd.* [1977] 2 MLJ 181 (*refd*) **i**

- a* *Nute v. Hamilton Mutual Insurance Co.* [1856] 72 Mass. 174 (*refd*)
Carbon Black Export Inc. v. The S.S. Monrosa 254 F. 2d 297 (*refd*)
Dynamics Corp. v. The Citizens & Southern National Bank, 356 F. Supp. 991 [1973] (*refd*)
Pope Manufacturing Co. v. Gormully 144 US 224 (*refd*)
"The Frank Pais" [1986] 1 LILR 529 (*foli*)

Legislation referred to:

- b* Carriage of Goods by Sea Act 1957
 Contracts Act 1950
 Debtors Act 1957, s. 19

Other source referred to:

Conflict of Laws, Scoles & Hay, 1984 Edn., p. 353

- c* For the appellant - *Ong Chee Kuan (Phang Chi Ming with him); M/s. Lee Ong & Kandiah*
 For the respondent - *M. Nagarajah; M/s. Shook Lin & Bok*

JUDGMENT**Gopal Sri Ram JCA:***Introduction*

- d* We heard and dismissed this appeal on 17 January 1995 without requiring Counsel for the respondent to address us. When the unanimous decision of this Court was announced, Counsel were informed that reasons would be given. These are now produced.

The Background

- e* On 16 August 1993 the vessel "The Interhill King", owned by the appellant, set sail for Hong Kong. It carried on board a cargo of about 4.8 million cubic meters of timber that had been loaded at the port of Kuala Mukah, Sarawak. The property in that cargo was with the respondent. The vessel never arrived at its destination. By the account of both litigants before us, it now lies at the bottom of the South China Sea. So does all the cargo that it carried. The respondent formed the view that the appellant was to blame for this state of affairs. It issued a writ *in personam* against the appellant on 7 January 1994 claiming damages for the negligent loss of its property. At this point I mention two other matters for completeness. The first is the fact that the "Interhill King" is a vessel registered in Malaysia. The second is the fact that the appellant is a company incorporated in this country.

- f* On the same date that the writ was issued, the respondent took out a summons for an injunction to restrain the appellant from dissipating its assets not exceeding USD 1 million and obtained it *ex-parte* on 19 January 1994 with a provision for its renewal at the end of two weeks. As it transpired, this injunction was renewed without opposition from the appellant. The appellant's reason for not opposing the renewal of the injunction will be dealt with in a moment. But I wish to digress for a while.

The Mareva - Jurisdiction

- g* The injunction which the respondent obtained is termed a "Mareva injunction". Initially there was some doubt as to whether we could issue such injunctions because of the express provision in s. 19 of our Debtors Act, 1957 that enables a plaintiff to attach a defendant's property before judgment and also because of the decision in *Lister v. Stubbs* [1890] 45 Ch D 1. That doubt was laid to rest by the decision of the Federal Court in *Zainal Abidin v. Century Hotel Sdn. Bhd.* [1982] 1 MLJ 260. The jurisdiction is now well entrenched and has been exercised on numerous occasions.
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While on this topic I would also call to mind the illuminating judgment of Edgar Joseph Jr. J, (as he then was) in *Pacific Centre v. United Engineers (Malaysia) Berhad* [1984] 2 MLJ 243, in which, apart from suggesting an alternative basis for the Mareva jurisdiction in this country, he has set out the important differences (and this is the only reported case in which this has been done) between that kind of injunctive relief and the pre-judgment attachment of debts under statute.

Taking a Step in the Action

I now return to the mainstream. On 12 February 1994, the appellant took out a summons to stay the action relying on the exclusive jurisdiction clause in the bill of lading that was issued by it to the respondent in respect of the cargo in question. I will say more about this clause in a moment. But before I do that there is one point of importance that I must mention. It has to do with the appellant's failure to resist the respondent's application to renew the injunction that had been obtained.

In the course of his address to the Judge at first instance, Counsel who appeared for the appellant in the Court below - not Mr. Ong - said that he did not do so because it would amount to a step in the action and would therefore prejudice his application for a stay. In my judgment, Counsel was plainly wrong in the view that he took.

The resistance offered by a defendant to the grant or the renewal of an injunction against him is a defensive measure not amounting to a step in an action. That this is the position in applications to stay an action on the ground that there is an agreement to refer disputes to arbitration has been settled by the decision of the Supreme Court in *Seloga Jaya Sdn. Bhd. v. Pembinaan Keng Ting (Sabah) Sdn. Bhd.* [1994] 2 MLJ 97 where the following passage in the judgment of Graham J, in *Roussel-Uclaf v. G.D. Searle & Co. Ltd.* [1978] 1 Lloyd's Rep. 225 at p. 232 was applied:

On the whole, I think that the statute is contemplating some positive act by way of offence on the part of the defendant rather than merely parrying a blow by the plaintiff, particularly where the attack consists in asking for an interlocutory injunction. Such a remedy against a defendant might well be necessary whether the action was ultimately stayed or not, in order to preserve, for example, the property the subject of the action in the meantime; and, as a practical matter, in such a case it would not be of importance whether the application to stay was made before, at the same time as or after the application for an injunction. Here it is not suggested that the plaintiffs were in any way embarrassed or taken by surprise by the making of the application to stay at the date at which it was made and I see no reason to penalise Searle (UK) in that respect. I do not think the present case is covered by the authority of *Pitcher's* case and it seems to me that the reasoning of Stirling J in the *Zalinoff* case is more pertinent to the circumstances here where an application for an injunction was being resisted.

I therefore, hold, in the circumstances of the present case, that Searle (UK) did not take any step in the action between the date of appearance and delivery of pleading such as to debar them from relief by way of stay. I therefore hold on this second ground also that a stay ought to be granted in respect of the action against both defendants.'

It is my view that the law has reached a stage where it may be quite safely said that there is really no difference in principle between cases where an application to stay an action is made on the ground that there is an exclusive jurisdiction clause and those cases where a stay is sought upon the ground that there is in existence an agreement to refer disputes to arbitration. According to the authorities I have perused, a plaintiff in either case is required to show strong grounds why he should not honour the bargain he made with the defendant. Also, in both kinds of case the Court has a discretion to permit litigation to continue before it.

a Of course, when it comes to the factors that have to be taken into account, these will vary according to the circumstances although cases may and do occur where the same set of circumstances may be relevant to the grant or refusal of applications for a stay based on different grounds. This will become self-evident much later in this judgment when I come to deal with the question of the burden upon the respondent.

b *The Application to Stay*

Returning now to the appellant's application for a stay, this came up before Abdul Malek J, on 4 July 1994. After hearing arguments he reserved his decision to 15 August 1994. However, having obviously arrived at a concluded view well before that date, he advanced the delivery of his decision to 27 July 1994 at which time he dismissed the appellant's summons.

c *The Forum-Selection Clause*

It is appropriate to now deal with the clause in the bill of lading on which the appellant grounded its summons. It is, what English textbook writers, and, it would appear even Judges from other parts of the Commonwealth, term an exclusive jurisdiction clause. American jurists refer to it as a forum-selection clause. I must confess my own preference for the latter terminology as it appears to be more accurate a description of such clauses. Henceforth I shall use that term.

d Forum-selection clauses are commonplace in commercial contracts, especially those with an international flavour. By that clause the parties in this case agreed to the contract being governed by Japanese law and to their disputes being adjudicated upon by the District Court of Tokyo. The Judge took the trouble to reproduce the clause in his judgment. Because of its importance I should do likewise. It is cl. 3 in the bill of lading and this is what it says:

e 3. (GOVERNING LAW AND JURISDICTION) The contract evidenced by or contained in this bill of lading shall be governed by Japanese Law except as may be otherwise herein, and any action thereunder shall be brought before the Tokyo District Court in Japan.

f The Judge also set out the usual clause paramount which makes the contract subject to the Hague Rules as enacted in Japan as the Carriage of Goods by Sea Act, 1957. I do not propose to recite it. He came to the conclusion that the action should, despite the parties having selected Japan as the forum of their choice, continue in this country.

The Judgment

g The nature of the criticism levelled by the appellant against the Judge's approach to the case calls for the reproduction of the relevant passages from his written judgment. This is what he said:

The authorities cited lean towards the grant of an order for a stay of proceedings where there is a breach of an exclusive jurisdiction clause but qualifies (*sic*) the position by stating that it is essentially a matter of discretion if the facts and circumstances are so strong as to amount to a good reason for the Court to hold otherwise.

h On the facts of this case, although there is an exclusive foreign jurisdiction clause for the dispute to be heard in Japan, it is not disputed that the defendant is resident in Malaysia and the vessel is registered here. It is also conceded that the cargo was loaded in East Malaysia and the vessel was en route to Hong Kong. Evidence-wise, it would be cheaper to transport the Filipino crew members here than to Japan. All other relevant documentary evidence was also readily available here. The plaintiff could also have some difficulty in enforcing a judgment obtained in Japan. Further, there is also some confusion as to whether the Hague Rules or the Hague-Visby Rules apply in Japan to determine the limit of liability.

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On these considerations, it was my view that the matter could and would be more appropriately dealt with here than in Japan. Accordingly, I had dismissed the defendant's application with costs.

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The appellant complains that these passages contain a misdirection by the learned Judge.

The Submissions of Counsel

Before us, Mr. Ong submitted that the Judge was wrong in the way in which he assessed the competing considerations when deciding that the action should continue before him. The Judge, said Counsel, merely weighed these on a balance. This, he submitted was an exercise more appropriate to a case governed by the doctrine of *forum non conveniens* but entirely unsuitable to a case such as the present where there is a forum-selection clause.

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Counsel argued that the matters that are to be taken into account by a Court when exercising discretion whether to stay an action in a case where there is a forum-selection clause are different from those which should be considered when deciding whether a plaintiff's complaints might more conveniently be dealt with in a forum elsewhere.

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In support of his argument, Counsel placed reliance upon the decision of the Singapore Court of Appeal in "*The Vishva Apurva*" [1992] 2 SLR 175, and in particular, upon the following passages in the judgment of Chan Sek Keong J, at p. 189 of the report:

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In our view, FA Chua J failed to give sufficient weight to the exclusive jurisdiction clause. We should accord full recognition to exclusive jurisdiction clauses which are freely negotiated between the parties and which are unaffected by 'fraud undue influence or overweening bargaining power' (see Warren Burger CL in *Bremen v. Zapata Off-Shore Co.* at p. 522), unless the plaintiff who seeks to break his contractual obligation can 'show that trial in the contractual forum will be (so) gravely difficult and inconvenient that he will, for all practical purposes, be deprived of his day in Court. Absent that there is no basis for concluding that it would be unfair, unjust, or unreasonable to hold that party to his bargain' (at p. 525).

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In the case before us, the respondents had failed to discharge the burden of showing that it was unfair unjust or unreasonable for the Court to hold them to their obligations under the relevant bills of lading. We were of the view, with respect, that FA Chua J had erred in the exercise of his discretion. We accordingly allowed the appeal with costs. (Emphasis added).

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Mr. Ong invited us to follow the approach in "*The Vishva Apurva*" and, on that basis, to reverse the Judge in this case. This is really an invitation to import the ratio in *Bremen v. Zapata Offshore Company* [1972] 407 US 1 into our common law.

I regret that I must decline the invitation of Counsel. There are compelling reasons for my refusal to apply the ratio in *Bremen v. Zapata Offshore Co.* (*supra*) which jurists in the United States call the "Zapata test". (See: *Conflict of Laws* by Scoles & Hay, 1984 Edn. p. 353 *et seq.*). I will state my reasons. But before I do so, it is necessary for me to deal with what I perceive to be the principles that apply to this appeal.

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The Applicable Law

The relevant law on the subject has, I believe, been settled by the decision of the Federal Court in *Globus Shipping & Trading Co. (Pte) Ltd. v. Taiping Textiles Berhad* [1976] 2 MLJ 154 where Gill CJ (Malaya), said:

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As regards the general principles in relation to jurisdiction where parties have agreed to submit exclusively to a foreign jurisdiction, in the case of *The Fehmarn* [1957] 2 All ER 707, Wilmer J, said at p. 710:

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- a* Where there is an express agreement to a foreign tribunal, clearly it requires a strong case to satisfy this Court that that agreement should be over-ridden and that the proceedings in this country should be allowed to continue. However, in the end it is, and must necessarily be, a matter for the discretion of the Court, having regard to all the circumstances of the particular case.

When it went up to the Court of Appeal [1958] 1 All ER 333 at 335 Lord Denning said:

- b* The next question is whether the action ought to be stayed because of the provision in the bill of lading that all disputes are to be judged by the Russian Courts. I do not regard this provision as equal to an arbitration clause, but I do say that the English Courts are in charge of their own proceedings: and one of the rules which they apply is that a stipulation that all disputes should be judged by the tribunals of a particular country is not absolutely binding. Such a stipulation is a matter to which the Courts of this country will pay much regard and to which they will normally give effect, **but it is subject to the over-riding principle that no one by his private stipulation can oust these Courts of their jurisdiction in a matter that properly belongs to them.** (The emphasis is mine)
- c*

In a later part of his judgment, the learned Chief Justice of Malaya reproduced the following passage from the judgment of Brandon J, as he then was, in "*The Eleftheria*" [1970] P 94:

- d* The principles established by the authorities can, I think, be summarised as follows:
- (1) Where plaintiffs sue in England in breach of an agreement to refer disputes to a foreign Court, and the defendants apply for a stay, the English Court, assuming the claim to be otherwise within its jurisdiction, is not bound to grant a stay but has a discretion whether to do so or not. (2) The discretion should be exercised by granting a stay unless strong cause for not doing so is shown. (3) The burden of proving such strong cause is on the plaintiffs. (4) In exercising its discretion the Court should take into account all the circumstances of the particular case. (5) In particular, but without prejudice to (4), the following matters, where they arise, may properly be regarded: (a) In what country the evidence on the issues of fact is situated, or more readily available, and the effect of that on the relative convenience and expense of trial as between the English and foreign Courts. (b) Whether the law of the foreign Court applies and, if so, whether it differs from English law in any material respects. (c) With what country either party is connected, and how closely. (d) Whether the defendants genuinely desire trial in the foreign country, or are only seeking procedural advantages. (e) Whether the plaintiffs would be prejudiced by having to sue in the foreign Court because they would: (i) be deprived of security for their claim; (ii) be unable to enforce any judgment obtained; (iii) be faced with a time-bar not applicable in England; or (iv) for political, racial, religious or other reasons be unlikely to get a fair trial.
- e*
- f*

- g* Gill CJ, then concluded his view in the following words:

- It would seem abundantly clear from the authorities that where a cause of action in respect of any dispute in relation to a contract arises and is therefore properly within its jurisdiction, the Court has a discretion whether or not to adjudicate upon the claim in the action even where the parties have agreed to refer such dispute to a foreign Court, and that the question of jurisdiction is quite separate from the question of the proper law of the contract to be applied.
- h*

"*The Eleftheria*" has been applied more recently by our Supreme Court in *Seloga Jaya* (*supra*), and by Syed Idid J, in *Sabah Gas Industries Sdn. Bhd. v. Trans Samudra Lines (S) Sdn. Bhd.* [1993] 3 CLJ 532. It has been followed in Australia (see *Aldred v. Australian Building Industries Pty Ltd.* [1987] 89 FLR 68; *Green v. Australian Industrial Investment Ltd.* [1989] 90 ALR 500; *Leigh-Mardon Pty. Ltd. v. PRC Inc.* [1993] 44 FCR 88; and *Williams*

- i*

v. *Society of Lloyds* [1994] 1 VR 274), in New Zealand (see *Apple Computer Inc. v. Apple Corps SA* [1990] 2 NZLR 598) and in Canada (see *G & E Auto Brokers v. Toyota Canada Inc.* [1981] 117 DLR (3d) 707).

a

Additionally, the decision in *Globus Shipping (supra)* has been applied by our Federal Court in a yet unreported case concerning an application based on the *forum non conveniens* doctrine. (See *American Express Bank Ltd. v. Mohamed Toufic Al-Ozeir*, Supreme Court Civil Appeal No. 02-225-94).

b

Indian Courts, before whom this subject has arisen on numerous occasions in the context of arbitration clauses under which the parties have agreed to the alternate resolution of their disputes in a foreign country, have consistently applied the dictum of Lord Denning in “*The Fehmarn*” (*supra*) and refused a stay of suits filed in defiance of the agreement to arbitrate abroad. (See *New Great Insurance Co. of India v. A.S.A. Kampagni* AIR [1964] Bom. 71; *Ramji Dayawala & Sons (P.) Ltd. v. Invest Import* AIR [1981] SC 2085; *Hindustan Zinc Ltd. v. Associated Metals & Minerals Corpn.* AIR [1983] Bom. 131).

c

Before I proceed any further, I must express my gratitude to my learned brother Justice Shankar JCA, for having drawn my attention to the Indian authorities from which I have obtained much guidance upon the question at hand, although I am not prepared to go so far as to agree with all that they have said.

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The Development After “The Eleftheria”

Sitting as a member of the English Court of Appeal in “*The El Amria*” [1981] 2 LILR 119 Brandon LJ re-affirmed all that he had said in “*The Eleftheria*” (*supra*), adding the qualification that Judges should not be drawn into making a comparison between the system of law administered by English Courts on the one hand and foreign Courts on the other. I think that the same holds true in our jurisdiction.

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In *Carvalho v. Hull, Blyth (Angola) Ltd.* [1979] 1 WLR 1228 at 1238 it was emphasised that the list provided by Brandon J, in “*The Eleftheria*” is not meant to be exhaustive.

It has also been said that it is no answer for a plaintiff who has agreed to trial in a particular foreign country to subsequently argue that he would suffer some procedural or substantive disadvantage under the *lex fori* of that country: *Trendtex Trading Corp. v. Credit Suisse* [1980] 3 All ER 721 at p. 736, affirmed by the House of Lords in [1982] AC 679; *The Kislovodsk* [1980] 1 LILR 183 at p. 186; *The Benarty* [1984] 2 LILR 244 at 251.

f

Having carefully read the English cases decided after 1969, I am left unimpressed that any significant learning has been added to this area of the law since “*The Eleftheria*”. In fact, I share the view of Nader J, in *Aldred (supra)* that the various cases seem to apply the same test although they express it in different ways.’

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The Position in Singapore

Prior to the decision in “*The Vishva Apurva*” (*supra*), the Courts of Singapore applied the approach taken in “*The Eleftheria*”. (See “*The Maldive Importer*” [1986] 1 MLJ 12; “*The Asian Plutus*” [1990] 2 MLJ 49)

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Indeed, in *Amerco Timbers Pte. Ltd. v. Chatsworth Timber Corporation Pte. Ltd.* [1977] 2 MLJ 181. Kulasekaram J, delivering the decision of the Singapore Court of Appeal set out factors not entirely dissimilar to those appearing in “*The Eleftheria*” (*supra*) without the benefit of that case having been cited to him. This is how he put it (at p. 181-2):

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- a** The law concerning an application for a stay is clear. Where a plaintiff sues in Singapore in breach of an agreement to submit their (*sic*) disputes to a foreign Court, and the defendant applies to (*sic*) a stay, the Singapore Court, assuming the claim to be otherwise within its jurisdiction, is not bound to grant a stay but has a discretion whether to do so or not. The Court in exercising its discretion should grant the stay and give effect to the agreement between the parties unless strong cause is shown by the plaintiff for not doing so. To put it in other words the plaintiff must show exceptional circumstances amounting to strong cause for him
- b** to succeed in resisting an application for a stay by the defendant. In exercising its discretion the Court should take into account all the circumstances of the particular case. In particular, the Court may have regard to the following matters, where they arise:
- (a) In what country the evidence on the issues of fact is situated or more readily available, and the effect of that on the relative convenience and expense of trial as between the Singapore and foreign Courts.
- c** (b) Whether the law of the foreign Court applies and, if so, whether it differs from Singapore law in any material respects.
- (c) With what country either party is connected and, if so, how closely.
- (d) Whether the defendants genuinely desire trial in the foreign country, or are only seeking procedural advantages.
- d** (e) Whether the plaintiffs would be prejudiced by having to sue in the foreign Court because they would:
- (i) be deprived of security for their claim;
- (ii) be unable to enforce any judgment obtained;
- (iii) be faced with a time-bar not applicable here; or
- e** (iv) for political, racial, religious or other reasons be unlikely to get a fair trial.

The Principles: A Summary

- There is much to be said in favour of leaving the law upon this subject in a state of certainty. Equally, it is also desirable that there be uniformity in the common law. No decision has
- f** been cited to us to show that the "*The Eleftheria*" test has been questioned in the jurisdiction from which it emanates or, for that matter, in any other jurisdiction. It must not be forgotten that what is under consideration is the discretionary power of a Court to stay proceedings. The advantages of leaving the question of whether a stay should be granted or refused with the Judge of first instance has not found any insuperable difficulty in other areas of the law where discretionary relief is sought and I am therefore of the view that no exception
- g** is warranted in this area of the law.
- To summarise, the relative merits of having a trial either in this country or in the agreed foreign tribunal as well as the competing considerations that have to be weighed in the balance when deciding whether to give effect to a forum-selection clause or to ignore it are matters pre-eminently within the province of the trial Judge. Usually in this type of case
- h** evidence is almost always given on affidavit with hardly any question of credibility arising. Since each case depends on its own facts, little or no assistance is to be derived from a copious citation of other decided cases. The Judge should be allowed to read, in the quiet of his chambers, the evidence filed in the case and the argument that is addressed to him should be crisp and brief. An appeal should be rare and this Court will be slow to interfere with the discretion exercised by the Judge unless, of course, it can be demonstrated to a
- i** conviction that the case is one that falls within the category of cases in which appellate interference is called for.

Reasons For Rejecting Zapata

The principal reason for my refusal to accept Counsel's invitation to apply the Zapata test is the juridical impossibility of incorporating it into our common law. A close examination of the American jurisprudence will reveal the difficulties involved.

Traditionally, Courts in the United States treated forum selection clauses, as being void against public policy. (See: *Nute v. Hamilton Mutual Insurance Co.* [1856] 72 Mass. 174; *Carbon Black Export Inc. v. The S.S. Monrosa* 254 F. 2d 297.)

This approach was jettisoned by the decision of the Supreme Court in *Zapata (supra)* where the facts were these. The plaintiff and defendant entered into a contract for the towing of an ocean-going drilling rig from Louisiana to Italy. A clause in the contract provided that "any dispute arising must be treated before the London Court of Justice". The rig was damaged at sea and was towed to Tampa, Florida where the plaintiff, in disregard of the forum-selection clause, filed proceedings in the admiralty side of the Federal District Court. The defendant, who had in the meantime commenced proceedings in London for breach of the towage contract, applied to stay the Florida action. The Federal District Judge held, following previous authority, that discretion should be exercised in the plaintiff's favour and for that reason refused a stay. The Court of Appeals affirmed that decision. The defendant then, in accordance with the appellate procedure obtaining in the United States, petitioned the Supreme Court for *certiorari* to quash the decision of the Court of Appeals. The Supreme Court granted *certiorari* to review, and, after hearing argument, vacated the judgment appealed against.

The majority opinion of the Court (with Douglas J dissenting) was delivered by Warren Burger Ch. J. This is what he said (at p. 12 of the report):

The argument that such clauses (meaning exclusive jurisdiction clauses) are improper because they tend to "oust" a Court of jurisdiction is hardly more than a vestigial legal fiction. It appears to rest at core on historical judicial resistance to any attempt to reduce the power and business of a particular Court and has little place in an era when all Courts are overloaded and when businesses once essentially local now operate in world markets. It reflects something of a provincial attitude regarding the fairness of other tribunals. No one seriously contends in this case that the forum-selection clause "ousted" the District Court of jurisdiction over Zapata's action. The threshold question is whether that Court should have exercised its jurisdiction to do more than give effect to the legitimate expectations of the parties, manifested in their freely negotiated agreement, by specifically enforcing the forum clause.

There are compelling reasons why a freely negotiated private international agreement, unaffected by fraud, undue influence, or overweening bargaining power, such as that involved here, should be given full effect. (Emphasis is mine.)

Later, at pp. 17-18 of the report he made the following observation:

This case, however, involves a freely negotiated international commercial transaction between a German and an American corporation of towage of a vessel from the Gulf of Mexico to the Adriatic Sea. As noted, selection of a London forum was clearly a reasonable effort to bring vital certainty to this international transaction and to provide a neutral forum experienced and capable in the resolution of admiralty litigation. Whatever "inconvenience" Zapata would suffer by being forced to litigate in the contractual forum as it agreed to do was clearly foreseeable at the time of contracting. In such circumstances it should be incumbent on the party seeking to escape his contract to show that trial in the contractual forum will be gravely difficult and inconvenient that he will for all practical purposes be deprived of his day in Court. **Absent that there is no basis for concluding that it would be unfair, unjust, or unreasonable to hold that party to his bargain.** (Emphasis supplied).

a Douglas J, recorded his dissent in the following words:

Respondent is a citizen of this country. Moreover, if it were remitted to the English Court, its substantive rights would be adversely affected ... Moreover, the casualty occurred close to the District Court, a number of potential witnesses, including respondent's crewmen, reside in that area, and the inspection and repair work were done there. The testimony of the tower's crewmen, residing in Germany, is already available by way of depositions taken in the proceedings.

b

All in all, the District Court Judge exercised his discretion wisely in enjoining petitioners from pursuing the litigation in England.

c

I have underscored the passages in the judgment of the learned Chief Justice of the United States that obviously influenced the Court of Appeal of Singapore in the "*Vishva Apurva*" (*supra*) in arriving at the conclusion that it did. I may add that these passages reflect American jurisprudence in respect of those elements that go to vitiate a contract.

d

It follows that on a realistic application of the test formulated by the majority in *Zapata* (*supra*), a Judge hearing an application for a stay mounted on a forum-selection clause would have no discretion at all in the matter. He may only refuse a stay on grounds sufficient to avoid a contract, that is to say, grounds that effectively negate consent. The rule is stated in terms so absolute (save for limited exceptions going to the issue of consent) that the area of discretion that is supposed to be vested in a Judge is reduced to vanishing point and, for all practical purposes, ceases to exist. These points were well brought out by my learned brother Justice Shankar JCA, during the hearing of the appeal and Mr. Ong, under the pressure of argument, had perforce to retreat from the extreme position he had originally taken.

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An adoption of the *Zapata* test by this Court would, in my respectful view, put at risk respected and high authority, both in this country and elsewhere (to which reference has already been made) that recognise a wide discretion in a Judge hearing an application for a stay.

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I do not for a moment suggest that the *Zapata* test may not be applied effectively by American Courts in the refusal of a stay. For, their concept of fraud is much wider than ours and would appear to include an ordinary breach of contract. (See *Dynamics Corp'n. v. The Citizens & Southern National Bank*, 356 F. Supp. 991 [1973]. Similarly, their doctrine of undue influence differs in material respects from that administered by our Courts. (See for example, the judgment of Brown J, in *Pope Manufacturing Co. v. Gormully* 144 US 224). Thus, although the labels ascribed to the several vitiating elements, such as fraud and undue influence may be identical, the content of those doctrines differs in essence as between Malaysia and the several jurisdictions that make up the United States.

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It follows that circumstances sufficient to avoid a contract under American law, if established before a Malaysian Court, may be inadequate to vitiate a contract under our *lex fori*. The important differences that exist between Malaysian and any foreign jurisprudence should always be borne in mind when deciding whether to incorporate the foreign principle into our common law. There are inherent dangers in importing a foreign doctrine and then subjecting it to the limitations of the municipal law. Due regard must always be had to the manner in which the foreign Court applies a particular principle in its domestic context. There must either be an acceptance of the entire jurisprudence upon a subject or a rejection of it in its totality: no piece-meal reception should be entertained.

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If I were to accede to the argument of Counsel, it would mean re-writing our law of contract. Quite apart from having to throw overboard principles already well entrenched in our law. I may also have to resort to judicial disobedience to the will of Parliament as expressed in the Contracts Act, 1950. I am not prepared to do this. If by my refusal I am to be consigned to the category of timorous souls, then I must, following the example of Asquith LJ, accept that fate with such fortitude that is at my command. Better such a fate than to be ranked amongst those who rush in where angels fear to tread.

Forum-Selection and Forum Non Conveniens

It is now necessary to deal with the differences that exist between applications based on the doctrine of *forum non conveniens* and those based on forum selection clauses

I begin by recognising that the law has not yet reached the stage where uniform principles are to be applied to both types of cases. And I do not regard the decision of the Federal Court in *American Express (supra)* as having created such an inroad into this area of the law where both principle and authority tell against the unification of approach (See *Trendex Trading (supra)*). The two, however, differ only in point of burden.

In the former, proceedings are properly commenced in this country. The defendant then applies to stay them on the ground that there exists elsewhere a forum that is more convenient to adjudicate upon the dispute. The burden is therefore on the defendant to demonstrate why the suit should not proceed to disposal in the place where it has been commenced.

In the latter, the plaintiff brings an action here in breach of an agreement to resolve the dispute in a foreign tribunal. The Court is, of course, not bound to give effect to such an agreement. A forum selection agreement is to be treated upon the same footing as an agreement that confers jurisdiction. Since consent cannot create or confer jurisdiction upon a Court that has none, it also cannot oust the jurisdiction that is properly seized of litigation. I draw support for this view from the judgment of Lord Denning in "*The Fehmarn*" (*supra*). Although that judgment has been criticised by academicians (see the articles in [1958] 7 ICLQ 599 and [1977] 26 ICLQ 825, 851) and by Counsel for the appellant before us, I respectfully agree with the views expressed by Lord Denning and gratefully adopt them as my own.

Having said all that, once the defendant invokes the agreement, the burden is on the plaintiff to show why the agreement should not be honoured. But there the difference ends. For, the matters that are relevant to the exercise of discretion in both cases are almost identical. This is well illustrated by "*The Frank Pais*" [1986] 1 LILR 529.

That was a case where an application was made to stay an action on two grounds. The first was based on a clause in the bill of lading which, *inter alia*, required all disputes to be decided in the country where the carrier (the defendant in that case) had his principal place of business. The defendant in that case had his principal place of business in Havana, Cuba. The second ground was that England was *forum non conveniens*. Sheen J, rejected the argument mounted on the contractual provision and in doing so he applied the statement of the law in *The El Amria (supra)*. This is what he said:

The defendants move the Court for a stay on the alternative ground of "*forum non conveniens*". The matters which have to be considered by the Court when exercising its discretion whether to give effect to an agreement to refer disputes to a foreign Court include those matters which are relevant to an application to stay on this alternative ground of *forum non conveniens*. As the plaintiffs have discharged the burden of showing strong grounds why I should not grant a stay of this action despite the agreement that any dispute should be decided in Cuba, it follows that the defendants would be unable to discharge the burden upon them of showing that, in the absence of such an agreement, this action ought to be stayed.

- a* In the present state of the law I am unable to say that the approach adopted by Sheen J is wrong.

The Present Appeal

That brings me to the present appeal.

- b* In my judgment, the learned Judge has committed no error in the way in which he stated the law. He took into account the fact that the vessel and the appellant are both Malaysian. The cargo was loaded at a Malaysian port. The evidence is admittedly both here and in Manila. But the Judge took this into account and came to the conclusion that trial in this country will be less expensive and more convenient. His judgment discloses that he was conscious of the burden on the respondent to produce strong grounds to displace the forum that had been selected. He asked himself all the right questions and, acting in obedience to binding precedent, came to the conclusion that there ought not to be a stay.
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In these circumstances we were satisfied that this is not a case for appellate interference. We therefore dismissed the appeal and made those consequential orders that usually follow a dismissal.

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